Supreme Court, U.S.
FILED
AUG 28 2006
OFFICE OF THE CLERK

(4)

Nos. 06-127

IN THE

Supreme Court of the United States

FREEEATS.COM, INC.,

Petitioner,

v.

NORTH DAKOTA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of North Dakota

BRIEF OF *AMICI CURIAE* THE CENTER FOR COMPETITIVE POLITICS, THE CENTER FOR INDIVIDUAL FREEEDOM, AND THE CENTER FOR THE RULE OF LAW IN SUPPORT OF PETITIONER

ERIK S. JAFFE
Counsel of Record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Amici Curiae

August 28, 2006

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INTEREST OF *AMICI CURIAE*[1]

The Center for Competitive Politics is a non-profit 501(c)(3) organization founded in August, 2005, by Bradley Smith, former Chairman of the Federal Election Commission, and Stephen Hoersting, a campaign finance attorney and former General Counsel to the National Republican Senatorial Committee. CCP's mission, through legal briefs, academically rigorous studies, historical and constitutional analysis, and media communication, is to educate the public on the actual effects of money in politics, and the results of a more free and competitive electoral process. CCP is interested in this case because it involves a restriction on political communications that will hinder political competition and information-flow and because, in the context of existing restrictions on various forms of election-related communications, it raises the costs, and thus decreases the usability, of one means of communication that provides a safety valve relative to the more severe restrictions on broadcast communications.

The Center for Individual Freedom is a nonpartisan, non-profit organization with the mission to protect and defend individual freedoms and individual rights guaranteed by the U.S. Constitution, including, but not limited to, free speech rights, property rights, privacy rights, freedom of association, and religious freedoms. Of particular importance to the Center in this case is the constitutional freedom of political speech, which is burdened by North Dakota's restrictions on political speech through interstate telecommunications.

The Center for the Rule of Law, chaired by the Honorable Ronald A. Cass, is a non-profit enterprise dedicated to educating the public about issues affecting the rule of law. The Center's legal scholars and policy experts analyze the rule of

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

law dimensions in matters ranging across regulation, litigation, international trade rules, competition law, property rights, intellectual property, securities and corporation law, administrative and constitutional law, and other governmental decisions. This case is of interest to the Center in that it involves an attempt to break down a clear rule of law separating the responsibility for intra- and interstate telecommunications, and will result in the proliferation of inconsistent rules affecting political speech that undermine clarity and consistency in the rule of law.

STATEMENT

The North Dakota statute at issue in this case, N.D.C.C. § 51-28-02, restricts, *inter alia*, the use of automatic dialer recorded message players (ADRMPs) to make interstate calls gathering political polling information and delivering political messages. In particular, the statute provides that

> A caller may not use or connect to a telephone line an automatic dialing-announcing device unless the subscriber has knowingly requested, consented to, permitted, or authorized receipt of the message or the message is immediately preceded by a live operator who obtains the subscriber's consent before the message is delivered. This section and section 51-28-05 do not apply to a message from a public safety agency notifying a person of an emergency; a message from a school district to a student, a parent, or an employee; a message to a subscriber with whom the caller has a current business relationship; or a message advising an employee of a work schedule.

The court below, Pet. App. 15a-16a, applied a presumption against preemption in an area covered by the cross section of two significant federal interests – interstate communications and the First Amendment's guarantee of freedom of speech.

The court also incorrectly found that the "plain meaning" of the savings clause in the Telephone Consumer Protection

Act ("TCPA") spared from preemption prohibitions on interstate calls using ADRMPs. The savings clause of the TCPA provides:

> Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive *intrastate* requirements or regulations on, or which prohibits--
>
> **(A)** the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;
>
> **(B)** the use of automatic telephone dialing systems;
>
> **(C)** the use of artificial or prerecorded voice messages; or
>
> **(D)** the making of telephone solicitations.

47 U.S.C. § 227(e)(1) (emphasis added).

The court below found that the limiting word "intrastate" in the savings clause only applied to "requirements or regulations on" the use of ADRMPs, but did not limit state "prohibit[ions]" on the use of such communications tools in *interstate* telecommunications. Pet. App. 10a-12a. The court thus concluded that the clause saved from preemption state prohibitions on both intra- and interstate use of such tools, even though the savings clause did *not* extend to *inter*state "requirements or regulations" given the placement of the word "intrastate" in the sentence.

SUMMARY OF ARGUMENT

1. The Petition in this case presents an important issue regarding both federal control over interstate communications, and state interference with communications that are integral parts of the political process. The consequences of allowing such state interference with the political communications at issue here are that an efficient and inexpensive means

of interstate political speech will be severely restricted and made more costly. Such restrictions undermine competitive electoral politics just as the country is gearing up for a major national election, and have a negative synergy with various federal restrictions on spending for mass political communication, limiting a non-broadcast-media safety valve for political speech at a time when the funding of broadcast political communication has become more heavily regulated. This case thus involves important national issues that should be resolved by this Court given the context and the timing of those issues as applied to such important political speech.

2. The court below made three critical errors in concluding that the North Dakota statute regulating, *inter alia*, political speech was not preempted. First, it incorrectly applied a presumption against preemption of state laws directed at interstate telecommunications, when the longstanding structure of the Federal Communications Act ("FCA"), and the text and history of the TCPA, undermine such a presumption and in fact suggest that an opposite presumption is more appropriate.

Second, the court below incorrectly concluded that the North Dakota statute was not preempted even assuming, *arguendo*, its erroneous construction of the TCPA's savings clause. Regardless whether that savings clause applies to interstate prohibitions on calls using ADRMPs, as distinct from *intra*state regulations on the use of such tools, it still would save such state law only from preemption by the TCPA itself, and not from any background preemptive effect of the FCA as a whole. Furthermore, given that the statute being challenged is in fact a requirement or regulation on, and not a prohibition of, the use of automatic dialers and recorded messages, it would not qualify for protection under the savings clause in any event. The court's treatment of the statute as a prohibition completely vitiates any meaningful distinction between prohibitions and restrictions that the savings clause might be thought to create.

Third, the court below incorrectly held that the language of the savings clause was plain in preserving *interstate* prohibitions. In fact, the savings clause is not "plain" at all, but rather is quite ungrammatical under any construction. Because there is an equally reasonable, though similarly ungrammatical, construction under which the modifier "intrastate" applies equally to requirements or regulations *on* the use of ADRMPs and to requirements or regulations *prohibiting* the use of ADRMPs, the savings clause is ambiguous. The choice of construction of that ambiguous clause should have been made by relying on the background provisions, policies, and history of the FCA and the TCPA. Such an approach would have yielded an opposite result in this case, with the narrower version of the savings clause, limited to *intra*state matters only, being the proper selection and the state statute being preempted. That narrow construction best comports with the long-standing background rule of the FCA and with Congress' fundamental understanding of the scope of state authority when it enacted the TCPA, and avoids unneeded conflict with the First Amendment.

ARGUMENT

I. The Petition Presents an Important Question Affecting the Freedom to Engage in Interstate Political Communications.

As the Petition correctly notes, the question presented in this case raises important issues under the Supremacy Clause affecting an area of interstate commerce – interstate telecommunications – that has long been the object of virtually exclusive federal control. Pet. 13-15, 17-19. Notwithstanding the history of exclusive federal control in this area, as recognized by Congress itself as the very predicate for adopting the TCPA, *see infra* at 10-11, States have increasingly sought to extend their authority into this interstate arena. Pet. 24-26.

In addition to the basic and substantial importance this case has under the Supremacy Clause and for interstate telecommunications as a subset of interstate commerce, this case also is important in that it arises in the context of state regulation of core political speech. While the question presented in the Petition is important for *all* non-commercial calling, the restriction on political speech in this case is especially pressing and significant and hence this case is a timely and important vehicle for addressing that question.

The First Amendment concerns underlying this case are highlighted by Congress' and the FCC's own rationales for creating an exception to the TCPA for non-commercial speech. Congress itself recognized the potential First Amendment problem when it authorized the FCC to create an exemption consistent with this Court's commercial speech jurisprudence. *See* PUB. L. 102-243, § 2(9), 105 Stat. 2394 (1991) ("Individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices"); *id.* § 2(13) ("the Federal Communications Commission should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution"). The FCC likewise confirmed the potential First Amendment problem when it found that the primary target of the TCPA was commercial speech, which has a relatively lower value on the constitutional spectrum than non-commercial speech and was the primary cause of the invasion of privacy that justified the TCPA in the first place. *See* Report and Order, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act Of 1991*, 7 F.C.C.R. 8752, 8773 (Oct. 16, 1992) ("the TCPA seeks primarily to protect subscribers from unrestricted commercial telemarketing activities"); *id.* ("The legislative

history of the TCPA contrasts calls made by tax-exempt non-profit organizations with commercial calls and indicates that commercial calls have by far produced the greatest number of complaints"). Indeed, in deciding to exempt non-commercial speech from most of the restrictions contained in the TCPA, the FCC specifically found that non-commercial communications did *not* pose the same harms as commercial solicitations, thus undermining any possibility of a compelling or even a substantial interest in restricting such non-commercial speech. *See id.* at 8774 ("no evidence has been presented in this proceeding to show that non-commercial calls represent as serious a concern for telephone subscribers as unsolicited commercial calls").

Various cases that have addressed First Amendment issues relating to the TCPA likewise have relied upon the more lenient standards for commercial speech in finding the TCPA did not violate the First Amendment. *See Destination Ventures, Ltd.* v. *FCC*, 46 F.3d 54, 55 (CA9 1995) (analyzing and upholding fax provisions of TCPA under commercial speech cases); *Minnesota ex rel. Hatch* v. *Sunbelt Communications and Marketing*, 282 F. Supp.2d 976, 981, 983 (D. Minn. 2002) (TCPA provisions on faxes upheld under commercial speech standards, and rejecting a claim of underinclusiveness as to political messages by finding that "political messages or solicitations for campaign contributions may be deemed to be "political speech" as opposed to "commercial speech," rendering *Central Hudson* inapplicable"); *Kenro, Inc.* v. *Fax Daily, Inc.*, 962 F. Supp. 1162, 1167 (S.D. Ind. 1997) (upholding TCPA fax provisions by applying commercial speech standards). The strong implication of those cases – particularly when coupled with the FCC's findings regarding less harm from non-commercial speech – is that similar restrictions on *political* speech would be hard-pressed to pass constitutional muster. *But see Moser* v. *FCC*, 46 F.3d 970, 973 (CA9) (erroneously analyzing the TCPA as a content-neutral time-place-manner restriction, rather than as a commercial

speech restriction, despite the FCC's adoption of an exemption for non-commercial speech as provided in the statute), *cert. denied*, 515 U.S. 1161 (1995).

The speech at issue in this case, and similar speech also restricted by the North Dakota statute, lies at the core of the First Amendment and receives its greatest protection. That underlying constitutional problem provides a reason to read preemption under the TCPA broadly and to read the savings clause narrowly as encompassing only intrastate prohibitions, in order to narrow the range of possible conflict with the First Amendment, and thereby avoid, or at least put off, the need to address a constitutional issue.

The question presented by the Petition takes on added urgency in light of the impending national elections. Given the increasing restrictions placed on the funding of electioneering communications through broadcast media channels, political speech related to elections using the alternative channels of, *inter alia*, telephone communications takes on added importance. And given that there are also a variety of restrictions on funding even non-broadcast efforts to get out the vote or use telephone banks for political communications, *see* 2 U.S.C. § 441i(b)(1) (restrictions related to state and local "Federal election activity"), *id.* § 431(20)(A)(iii) (defining "public communication" as part of "Federal election activity), *id.* at 431(22) (defining public communication as including communications by a "telephone bank to the general public"), statutes such as the one being challenged here can significantly restrict or burden this non-broadcast alternative avenue of political communication. Such alternative forms of political communications have stepped in to fill the gap from the greater restrictions on broadcast communications precisely because technology has advanced to make such alternatives cost effective within the funding constraints imposed by campaign finance laws. Indeed, Congress has recognized that automated and pre-recorded telecommunications have expanded precisely because such automation has lowered their

cost (relative to having large numbers of persons manning a phone bank). *See* S. REP. 102-178, 102nd Cong., 1st Sess., Oct. 8, 1991, *reprinted in* 1991 U.S.C.C.A.N. 1968, 1969 ("the advance of technology * * * makes automated phone calls more cost-effective").

With laws such as North Dakota's, however, States will raise the costs of communicating with their populations and effectively wall off their citizens from an efficient and effective means of communications. If this Court allowed such a cost-effective alternative avenue of communication to be shut down, or significantly impeded by the requirement of a live person initiating each and every call, that would undermine one of its justifications for upholding restrictions on broad-based communications in the first place, and hinder the political process in a manner contrary to the First Amendment.

The negative synergies that arise from allowing States to undermine the FCC's exemption for political telecommunications thus reach well beyond issues of consumer privacy, federal supremacy, and interstate commerce, and encroach upon a vital constitutional area on the eve of a major national election. Timely consideration of this case, and correction of the error below, thus is of pressing national importance.

II. The Savings Clause in the TCPA Should Be Read Narrowly so as To Avoid Trenching on Important Areas of Free Speech and Interstate Commerce.

In order to avoid an unnecessary clash with the First Amendment (and possibly with other constitutional constraints such as the Dormant Commerce Clause), this Court should read the TCPA's savings clause narrowly as limited to preserving only the States' traditional authority over intrastate telecommunications, and not extending their authority into the interstate realm as well. Fortunately, there are ample grounds for such a limited reading that would preserve the long-standing dichotomy between federal and state jurisdiction over telecommunications.

A. The Court Below Applied an Incorrect Presumption Regarding Whether the North Dakota Statute Was Preempted.

As noted in the Petition, the court below incorrectly applied a presumption *against* preemption, notwithstanding the pervasive and largely exclusive federal regulation of interstate telecommunications. *See* Pet. 17-19; Pet. App. 15a-16a. But against the background division of inter- and intrastate jurisdiction established by 47 U.S.C. § 152(a) & (b), that presumption was error and, if anything, should have been exactly reversed. Indeed, the error of the presumption applied below, and the appropriateness of a presumption in favor of preemption of state encroachments on interstate telecommunications, is confirmed by the text and history of the TCPA itself.

When it enacted the TCPA, Congress specifically found, as part of the law, that there was a need for federal legislation because "[o]ver half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operation." PUB. L. 102-243, § 2(7). That express statutory recognition of the state of the law prior to the TCPA is compelling proof of the limits Congress understood to exist on state regulation of interstate telecommunications. Having been incorporated into a statute passed by Congress, such congressional understanding of the jurisdictional boundaries it has created in the telecommunications area is entitled to considerable respect from this Court when it comes to assessing whether the TCPA somehow abolished or modified such existing boundaries.

The legislative history of the TCPA similarly confirms Congress' understanding that the States could not reach out to control interstate telecommunications. *See* S. REP. 102-178, 1991 U.S.C.C.A.N. at 1970 (recognizing over 40 state laws on ADRMPs and noting their limited effect "because States do not have jurisdiction over interstate calls"); *id.* (noting that States desired federal regulation of "interstate calls to supplement their restrictions on intrastate calls"); *id.* at 1973

("Federal action is necessary because States do not have the jurisdiction to protect their citizens against those who use these machines to place interstate telephone calls.").

Given the fundamental predicate of preemption as the basis for enacting the TCPA in the first place, the court below erred in assuming and applying a contrary presumption against preemption in this case.

B. The Court Below Incorrectly Ignored the Pre-Existing Preemptive Effect of the FCA, which Applies Regardless of Any Additional Preemption, or Lack thereof, Due to the TCPA.

Even assuming, *arguendo*, the North Dakota Supreme Court's broad construction of the TCPA saving clause as applying to interstate prohibitions on the use of ADRMPs, the decision below still erred in finding that the state statute was not preempted. Regardless whether the TCPA itself fails to preempt the law in question, the statute would be preempted even without the TCPA, and nothing in the TCPA's savings clause changes that pre-existing result.

Under the FCA, interstate telecommunications is the province of the FCC, not the States. 47 U.S.C. § 152(a). Given the history of extensive federal regulation in this area and the text and history of the TCPA recognizing the lack of state jurisdiction – not to mention the operation of the Dormant Commerce Clause on state regulation of the instrumentalities and functioning of interstate communications – any state intrusion into interstate telecommunications should have been met with a high degree of skepticism, not a presumption of permissibility and a narrow focus on a limited savings clause. The starting point of the analysis thus should have been the preeminent and presumptively exclusive federal power over interstate commerce, not a misplaced reliance on the supposed breadth of the State's police power.

With the proper background regarding preemption firmly in mind, the question is whether the passage of the TCPA

somehow undermined that existing preemption, even assuming, *arguendo*, that it did not provide a *new* ground for preemption. Turning to the TCPA, that act *required* a variety of restrictions on the use of ADRMPs, but in no way suggested that the FCC previously lacked the *power* to regulate the use of such devices in interstate telecommunications. Indeed, the only aspect of the FCC's jurisdiction that was expressly addressed was the *addition* of FCC authority over certain intrastate communications – authority that it previously lacked due to 47 U.S.C. § 152(b), which was expressly amended to address the expansion of FCC authority. *See* Pet. 2-3, 17-18. But there was no concomitant amendment restricting the FCC's existing authority over interstate communications under § 152(a), or expanding state jurisdiction into that area, suggesting that such FCC authority already existed and continued with the same preemptive force it had in the first place.

Similarly, the savings clause itself constrained only the effect of the TCPA itself, with no suggestion that it was likewise constraining the force of § 152(a). In particular, the clause states that "nothing in *this section*," or the regulations thereunder, shall preempt state law in the narrow circumstances it defined. 47 U.S.C. § 227(e)(1). The savings clause does *not* address whether such state law is already or otherwise preempted by *other* aspects of the statutory scheme, for example, the jurisdictional boundaries established by § 152.[2]

Thus, even assuming the TCPA does not preempt the North Dakota law by its own operation, there is no reason to

[2] The very existence of that clause suggests that the TCPA had some *additional* preemptive force relative to the background preemption under the FCA. That implication follows from the very nature of a savings clause in the first place, which is to save something from an effect that would otherwise occur. *See* BLACK'S LAW DICTIONARY 1344 (7th ed. 1999) ("savings clause. 1. A statutory provision exemptiong from coverage something that would otherwise be included."). Such additional preemption would be in connection with the FCC's new authority over certain *intra*state communications, which the savings clause counters to some degree.

suspect that it in any way undermined the preemptive force that already existed by virtue of § 152(a). The decision below thus erred by changing a limited savings clause applicable only to the TCPA itself into a broader savings clause that carved out an exception to the FCA in general.

Furthermore, even assuming the construction of the savings clause given by the court below, it still would not save the statute at issue here, which is plainly a "requirement or regulation" on the use of ADRMPs rather than a prohibition. The TCPA's savings clause, according to the court below, saves any state law "which prohibits -- * * * (B) the use of automatic telephone dialing systems; [or] (C) the use of artificial or prerecorded voice messages." 47 U.S.C. § 227(e)(1)(B) & (C). The court below apparently concedes that an *inter*state "requirement or regulation" is preempted by the TCPA insofar as such state action falls outside the specifically narrowed terms of the savings clause. Such preemption exists by force of the TCPA itself, quite apart from the effect of the FCA in general.

The court below drew a distinction between requirements and regulations on the one hand, and a prohibition on the other, reasoning that a prohibition is less intrusive in that it has a single answer – "no" – to any conceivable question concerning the use of automatic dialers or recorded messages going into the State, and hence would not be confusing or burdensome. Pet. App. 11a-12a. But N.D.C.C. § 51-28-02 certainly does not "prohibit" the "use of" automatic dialing systems or prerecorded messages, and indeed expressly allows their use under a variety of circumstances. For example, the statute allows the use of such communications tools where there has been consent or permission for such use, where the messages are for public safety purposes, for school- and work-related messages, and where the caller has a current business relationship with the person being called. Rather than a universal "no" to the use of ADRMPs, North Dakota establishes a variety of conditions and requirements on their

use. While uses not meeting such requirements are indeed forbidden, that would be true regarding *any* requirement or regulation, which would restrict non-compliant uses.

Such conditional limits and exceptions regarding the use of ADRMPs are *not* an outright prohibition on the use of such communications tools and thus do not qualify for protection under the savings clause even assuming the court's broader construction of that clause. That the court below nonetheless applied the savings clause to the statute in this case simply shows that it conflated requirements and regulations with a prohibition, and gutted the very distinction upon which its construction relied. That conflation of terms entirely vitiates the effect of the word "intrastate" even as a limit on "requirements and regulations." If every regulation can be recast as a prohibition, then *no* state law affecting the interstate use of ADRMPs would be preempted and the actual language of the savings clause would make no sense at all. Such *de facto* mutilation of the TCPA's savings clause is reason enough for this Court to grant certiorari, even if it agreed with the North Dakota Supreme Court's basic construction of that clause.

C. The Court Below Incorrectly Concluded that the Ambiguous Savings Clause in the TCPA Plainly Protected the Statute Being Challenged.

As noted in the Petition, the "plain meaning" analysis of the court below depended on a construction of the savings clause that was ungrammatical in that it equated two clauses that start with the materially different words "that" and "which." Such grammatical difficulty is a function of the poorly drafted savings clause itself, which seems to lack *any* wholly grammatical construction at all, and hence can hardly be said to have a "plain" meaning. Indeed, the grammatical problem identified in the Petition makes it far from plain that the phrase "or which prohibits" defines a different category of state law separate from "intrastate requirements or regulations" rather than a potential *subset* of such requirements or

regulations. Given that there is an equally plausible construction of the clause that would *not* save the statute being challenged, the clause presents a classic case of ambiguity.

Under the North Dakota Supreme Court's reading, the two phrases supposedly defining the separate categories of "law" to which the savings clause applies make an ungrammatical switch between the restrictive word "that" and the non-restrictive word "which." Charting the sentence as the court below would read it demonstrates that the *object* of the qualifying phrases would be "any State law." *See* Chart 1, below. The chart also shows, however, that the qualifying phrases switch between starting with "that" and "which," thus undermining the supposedly parallel construction claimed by the court, and raising doubts that the word "intrastate" applies exclusively to the phrase addressing "requirements and regulations." A wholly grammatical sentence having the meaning ascribed below would start both phrases with the word "that" to demonstrate parallel and separate phrases.

Chart 1: Construction by Court Below

<table>
<tr>
<td rowspan="3">[N]othing in this section or in the regulations prescribed under this section shall preempt <u>any State law</u></td>
<td><u>that</u> imposes more restrictive <u>intrastate</u> requirements or regulations on</td>
<td rowspan="3">* * *
(B) the use of automatic telephone dialing systems; [or]
(C) the use of artificial or prerecorded voice messages
* * *</td>
</tr>
<tr>
<td>, or</td>
</tr>
<tr>
<td><u>which</u> prohibits--</td>
</tr>
</table>

An alternate reading, though not without grammatical problems of its own, is that the underlying *object* of the relevant qualifiers is "interstate restrictions and regulations,"

which is then modified by the disjunctive and parallel descriptive phrases "on * * * the use of" automatic dialers or prerecorded messages and "which prohibits * * * the use of" automatic dialers or prerecorded messages. Charting that alternate reading, *see* Chart 2, below, shows the elimination of the that/which problem. The word "that" begins a compound restrictive phrase that encompasses *all* of the following language, and the word "which" begins only a non-restrictive sub-phrase within the larger compound restrictive phrase. The chart, however, demonstrates a different, though common, grammatical problem, which is the failure of number agreement between the non-restrictive phrase "which prohibit*s*" and the internal object of that phrase "more restrictive interstate requirements or regulations." A wholly grammatical sentence with this alternate construction would have used "which prohibit" to qualify the plural object of the phrase.

Chart 2: Alternate Construction

[N]othing in this section or in the regulations prescribed under this section shall preempt any State law <u>that</u> imposes <u>more restrictive intrastate requirements or regulations</u>	on	* * * **(B)** the use of automatic telephone dialing systems; [or]
	, or	**(C)** the use of artificial or prerecorded voice messages
	which prohibits--	* * *

Given that both potential constructions have grammatical flaws of a similar magnitude – the confusion of "that" versus "which" or the failure of number agreement between an object and its modifier – neither can be said to produce a *plain*

meaning but likewise neither can be dismissed as plainly *incorrect* given the lack of any fully grammatical alternative. That would seem to be the quintessential situation of ambiguity, which then shifts the focus to other indicia of congressional intent and to the construction favored by the agency charged with implementing the statute. *See* Pet. 6-7 (FCC takes broad view of preemption under the TCPA).

Such a change in focus from plain-meaning analysis to selection between competing constructions of an ambiguous savings clause would yield precisely the opposite result from the decision below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

ERIK S. JAFFE
Counsel of Record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Amici Curiae

Dated: August 28, 2006.